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No. 90-1858

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. BAYLOR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals should have remanded the case of petitioner, a white man, for a determination whether the prosecutor had discriminated against black jurors during jury selection, when the court remanded the cases of petitioners' black co-defendants for such a determination.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A42-A59) is reported at 928 F.2d 99.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1991. The petition for a writ of certiorari was filed on June 3, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371 (Count 1); obstruction of justice, in violation of

18 U.S.C. 1503 (Count 6); bank fraud, in violation of 18 U.S.C. 1344 (Count 19); accepting or paying kickbacks, in violation of 41 U.S.C. 51 and 54 (Counts 40, 42-44); making false statements, in violation of 18 U.S.C. 1001 (Counts 36 and 37); and filing false corporate tax returns, in violation of 26 U.S.C. 7206(2) (Counts 68 and 69). He was sentenced to four years' imprisonment and a $5,000 fine. The court of appeals affirmed. Pet. App. A42-A59.

1. Petitioner, who is white, was jointly tried with co-defendants Morgan Joe and Alton Skeeter, who are black. During jury selection, the defendants were allotted 12 peremptory challenges and the government six. The parties agreed to select the jury by having the clerk draw the names of 30 potential jurors; the parties then exercised all of their peremptory challenges so that the remaining jurors constituted the 12-member panel. Of the 30 potential jurors chosen, 19 were white and 11 were black. Four alternate jurors were selected by a similar procedure: the clerk drew eight names at random, and the government and defense each exercised two peremptory strikes. Pet. App. A44, A46-A48.

In exercising its eight peremptory challenges, the government struck five black jurors from the panel and one black alternate. The government struck one white juror it had previously unsuccessfully challenged for cause, and one white alternate juror. The jury as empaneled included six black jurors. Pet. App. A48.[1]

Before the jury was sworn, defendants Joe and Skeeter moved to dismiss the jury on the ground that the government had exercised its peremptory challenges in a racially discriminatory manner, in

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[1] Several jurors originally seated on the panel were excused during the course of the trial and replaced by alternates. The jury that deliberated and returned the verdict included five black jurors. Pet. App. A48.

violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The district court summarily denied the motion, but it required that the government meet with the court reporter the following day, out of the presence of the court and the defendants, to dictate its reasons for striking the six black jurors. Thereafter, without reviewing the proffered explanations, the court sealed the record containing the government's reasons. Pet. App. A48-A49; 10/30/89 Tr. 239-240.

At the conclusion of the trial, defendants Joe and Skeeter renewed their motion. They claimed they had made out a prima facie case under *Batson* and urged the court to review the government's explanations to determine if the strikes were race-neutral. Pet. App. A49-A50. When the court inquired whether defense counsel wished to put the prosecutor on the stand testify about his reasons for striking the black jurors, defense counsel reiterated several times that there was no need for such a procedure, and that the determination could be made on the basis of the record as transcribed by the court reporter. 1/17/90 Tr. 28, 32, 34, 35-36; 1/18/90 Tr. 5.

The district court then read the transcript of the government's reasons for its peremptory strikes and ordered that the transcript be turned over to defense counsel. Before recessing the proceedings for defense counsel to examine the transcript, however, the court indicated that it believed there was no merit to the claim that the government had engaged in racial discrimination in exercising its peremptory challenges. 1/17/90 Tr. 31.

The transcript reflected the following explanations for the prosecutor's strikes against black jurors: (1) John Hill was struck because his daughter worked for the firm managed by defendants Joe and Skeeter; (2) Thermon Lawrence was struck because he was 71, apparently in ill health, and worked for a Navy contractor that performed cleaning contracts, a field then under investigation for fraud; (3) Gus Jackson was

struck because he was employed in the supply department at the Naval Air Station in Oceana, a department under active investigation for fraud at the time of trial, and because he had exhibited an unfriendly demeanor toward the government; (4) Pamela Elliot was struck because she had worked for a company that did work for the firm managed by Joe and Skeeter, because she was the youngest prospective juror, because she had dropped out of college, and because she was from Portsmouth, Joe's residence; (5) Fannie Perry was struck because she had an 11th grade education, because she was a single mother, and because she appeared angry when she looked toward the prosecutor during the jury selection process; (6) alternate Rosa Fitchett was struck because, at the time of trial, she worked for the Navy Supply Center, which had been the focus of fraud investigations for 15 years, and may have worked there at the same time as a co-conspirator in the case, and because she had displayed a friendly demeanor toward the defendants. Gov't C.A. Br. 9-15.

After the recess, the court listened to the defense arguments, reiterated its belief that the government's statement provided no evidence of racial discrimination, and agreed to defense counsels' request for supplementary argument on the issue the following morning. 1/17/90 Tr. 33-35. The next day, after extensive argument on the issue by counsel for Joe and Skeeter, the court denied the *Batson* motion, finding it to be "frivolous." 1/18/90 Tr. 27.

2. The court of appeals affirmed petitioner's conviction, but reversed and remanded as to Joe and Skeeter. The court held that because the district court had not made adequate factual determinations when it rejected the *Batson* claim, it was necessary to remand the cases of Joe and Skeeter for further proceedings. Pet. App. A45.

The court stated that the district court had departed from the "preferable" procedure under *Batson* in sev-

eral ways. First, the district court had not ruled on the question whether a prima facie case of discrimination existed before having the government state its reasons, and had not supported its acceptance of the government's reasons with findings of fact. Second, the court had instructed the government to state its reasons outside the presence of the court, thus depriving the trial judge of an opportunity to evaluate the prosecutor's credibility. Third, the court had deferred ruling on the *Batson* issue until after trial. Pet. App. A55-A56.

Although Joe and Skeeter urged the court of appeals to rule on the adequacy of the government's reasons on the basis of the existing record, the court determined that it was "not well positioned to conduct this important analysis with only a cold record and without the benefit of findings and supporting reasons of the trier of fact." Pet. App. A58. Accordingly, the court "remand[ed] the cases of Joe and Skeeter to the district court with instructions to conduct a *Batson* violation analysis." *Id.* at A59. The court did not remand as to petitioner, but affirmed his convictions.

3. After the time for filing a petition for rehearing in the court of appeals had expired, this Court issued its decision in *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991), holding that a white defendant has standing to assert a *Batson* violation with respect to a prosecutor's exercise of peremptory challenges against black jurors. On remand of the case to the district court, petitioner requested that he be allowed to participate in the *Batson* hearing. The district court granted the motion, without determining whether petitioner could be granted any relief, and, on May 16, 1991, conducted the *Batson* hearing. To date, the court has not issued its ruling.

ARGUMENT

Petitioner contends (Pet. 14-17) that the court of appeals should have remanded his case, as well as

his co-defendants' cases, to the district court for a determination whether the government exercised its peremptory strikes against black jurors in a discriminatory fashion. He asserts that "[i]t must be assumed [that] the Fourth Circuit[,] based on its emphasis in its opinion that Joe and Skeeter are black and Baylor is white, did not believe Petitioner had standing, based on his race, to raise a *Batson* violation." Pet. 16. Whether or not petitioner's assumption about the court of appeals' decision is correct, he is not entitled to relief from this Court. Because petitioner forfeited his *Batson* claim by failing to raise it in the district court, the petition for a writ of certiorari should be denied.

In *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991), this Court held that a white defendant may raise a *Batson* challenge to the prosecutor's use of peremptory strikes against black jurors.[2] If the court of appeals had relied on the fact that petitioner is white in refusing to remand his case for a determination under *Batson*, that reliance would have constituted error. The court of appeals, however, did not state that it relied on that ground, and the court may well have reached the result it did because of the view that petitioner had not properly raised the *Batson* issue on appeal.[3]

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[2] *Powers* applies retroactively to petitioner's *Batson* claim because, under *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."

[3] The court of appeals initially characterized the *Batson* claim as "[t]he principal error assigned by defendants Joe and Skeeter" without mentioning any participation in that claim by petitioner. Pet. App. A44. Such an exclusion of petitioner from the *Batson* issue is consistent with the statement in the joint brief filed by petitioner and his co-defendants that "the district court's rubber stamp of the Government's explanations constitutes clear error, requiring a reversal of the convictions of *Joe and Skeeter* and a new trial." *Id.* at A38, quoting Pet. Jt. C.A. Br. 19 (emphasis added). On the other hand, the joint brief

But regardless of the ground for the court of appeals' ruling, this Court should not grant certiorari to have the court of appeals reexamine its ruling in light of *Powers*. Petitioner expressly declined to raise the *Batson* issue in the district court, and he appears to have done so for strategic reasons. Having deliberately waived the *Batson* issue in the district court, petitioner is not entitled to switch gears on appeal and join in that argument in order to enjoy a windfall remand based on his co-defendants' success.

It is well settled that a defendant may forfeit a *Batson* claim by failing to raise it timely in the district court. *Clark* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 90-2361 (4th Cir. June 19, 1991), slip op. 12 (noting that "[e]ven in criminal cases, the [*Batson*] objection is waived if not timely raised"); *Government of the Virgin Islands* v. *Forte*, 806 F.2d 73, 76 (3d Cir. 1986) (holding that "because Forte failed to make any [*Batson*] objection at the close of voir dire, he waived his present claim"); *United States* v. *Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), cert. denied, 481 U.S. 1004 (1987); see *Ford* v. *Georgia*, 111 S. Ct. 850, 857 (1990) ("Undoubtedly, then, a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected."). The considerations underlying waiver rules apply with special force when a defendant has deliberately withheld an objection at trial for tactical reasons. As this Court has noted in a related context, "default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not

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also included in its "statement of the issues presented for review" the question "[w]hether Joe, Skeeter, and [petitioner] are entitled to a new trial based on principles of [*Batson*]." Pet. App. A16, quoting Pet. Jt. C.A. Br. 19. Petitioner's separate brief also adopted the *Batson* argument of his co-defendants. Pet. App. A41. See Fed. R. App. P. 28(i).

personally waived that claim." *Murray* v. *Carrier*, 477 U.S. 478, 485 (1986). If the rule were otherwise, it would "encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a * * * trial court with the intent to raise their constitutional claims in a[n appellate] court if their initial gamble does not pay off." *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977).[4]

The record is clear that petitioner waived the *Batson* issue in the district court. Petitioner makes no claim that he joined in the *Batson* issue at the trial stage, and in fact the record reflects that petitioner's trial counsel did not accept the court's invitation to join the *Batson* motion made by petitioner's co-defendants.[5] Nor did petitioner join in the lengthy *Batson* arguments made by counsel for Joe and Skeeter at the conclusion of trial. See 1/17/90 Tr. 7-38; 1/18/90 Tr. 3-27.[6]

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[4] Petitioner does not attempt to show that, under Fed. R. Crim. P. 52(b), his claim would amount to plain error "such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice," *United States* v. *Young*, 470 U.S. 1, 16 (1985). Nor could any claim of plain error be sustained. After considering the government's reasons, the arguments of defense counsel, and the prosecutor's demeanor during the *Batson* hearing, the district court found the claim of discrimination to be frivolous. Although the court of appeals remanded for factual findings to facilitate appellate review, there is nothing in the record to suggest that any *Batson* violation occurred in this case, let alone that petitioner's substantial rights were violated.

[5] When the court met with counsel, late in the day of jury selection, to discuss the *Batson* issue, the court stated to petitioner's counsel: "Mr. Swain, do you want to join in? You are representing a white defendant. I don't know what you want to do." Petitioner's counsel replied: "I'm just hungry, Your Honor." 10/30/89 Tr. 239-240.

[6] The district court indicated its awareness that petitioner's counsel was not raising the *Batson* issue. At one point, the court stated to counsel for Joe that even though the court thought that the evidence of a *Batson* claim was "very, very flimsy," it

Statements made by petitioner's counsel earlier in the case shed light on why petitioner did not join in his co-defendants' *Batson* motion. The indictment charged petitioner with having engaged in a kickback conspiracy involving a company called Systems Management American Corporation (SMA), of which Joe and Skeeter were officers. In arguing for a severance of trial from Joe and Skeeter, petitioner bluntly stated that he had a strategy for jury selection that diverged from that of his black co-defendants; petitioner's aim was not to have blacks on the jury. Petitioner's counsel explained:

> MR. STANT: All right sir, Now, finally * * * you come to one that's hard to approach, but I think I have a duty to approach it. SMA was a minority company. SMA obviously has a community reputation one way or another. Mr. Shuttleworth and Mr. Lustig [counsel for Joe and Skeeter] are going to be very, very hopeful of having a lot of black jurors. My strategy would be not to have them.
>
> THE COURT: Well, I've given some thought to that, and nobody —
>
> MR. STANT: And, obviously, I'm going to be—to be prejudiced, because I'm only one and they're two.

7/20/89 Tr. 125. These statements suggest that petitioner's decision not to join in his co-defendants' *Batson* claim was purposeful: as a matter of trial strategy, petitioner, a white defendant, did not object to the removal of black jurors. Having elected to pursue that trial strategy in the district court, petitioner cannot change course on appeal and now assert that, under *Powers*, he may challenge his conviction by al-

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did not "blame you * * * Mr. Lustig, and Mr. Shuttleworth [counsel for Joe and Skeeter] one bit for asserting it." 1/17/90 Tr. 35.

leging that the equal protection rights of black jurors may have been violated.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] This is not a case in which it is necessary to accord standing to petitioner in order to ensure that someone is available to protect minority jurors against racial discrimination in jury selection. Cf. *Powers*, 111 S. Ct. at 1372-1373 (explaining that the third-party standing of white defendants to assert the equal protection rights of black jurors is justified in part because excluded jurors are unlikely to enforce their own claims). Here, Joe and Skeeter actively pursued the *Batson* issue at trial, on appeal, and on remand. Although, in our view, the record does not support any claim of discrimination by the government, that issue will be thoroughly aired and determined without granting petitioner's belated request to ride on Joe and Skeeter's coattails.